82-418

No.

Supreme Court of the United States

October Term, 1983

DORIS AFFELDT, *et al.*,
Petitioners,

vs.

J.C. PENNEY COMPANY,
HARPER WOODS STORE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Was it error for the lower courts to apply the *Green-Burdine* sequential allocation of proof designed for individual non-pattern and practice cases to pattern and practice cases, whether of an individual or class action nature?

2. Was it error for the lower courts to dismiss plaintiff's class action claim because of the belief that the plaintiff would not prevail on the merits and when they refused to consider plaintiff's statistics and her claim that she and other females were the victims of the company's lock-in policy?

LIST OF ALL PARTIES

The parties to the proceedings below are Doris Affeldt, on behalf of herself and all other similarly situated females, and the J.C. Penney Company, Harper Woods Store, Harper Woods, Michigan.

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To the United States Court of Appeals
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OPINION BELOW

The Opinion and Order of the United States District Court for the Eastern District of Michigan, Southern Division, granting judgment for the defendant is reproduced in the Appendix at page A5. The Magistrate's Report and Recommendations of the United States District Court for the Eastern District of Michigan, Southern Division, finding for the defendant is reproduced in the Appendix at page A8. The Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the District Court is reproduced in this Appendix at page A1.

JURISDICTION

The judgment of the Court of Appeals was entered June 17, 1983, and issued as a mandate on July 12, 1983. The petition for writ of certiorari has been timely filed inasmuch as it was filed within the ninety (90) day period. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, provides in the relevant section of 42 U.S.C. Section 2000e-(a)(1) and (a)(2) provides:

> "(a) It shall be an unlawful employment practice for an employer:
>
> > "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
> >
> > "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (As amended by P.L. 92-261, eff. March 24, 1972)."

STATEMENT OF THE CASE

This is a class action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*, by Doris Affeldt, a white female, upon behalf of herself and other females similarly situated. The respondent, J.C. Penney Company, Harper Woods store, located in Harper Woods, Michigan has a workforce of approximately 500 employees, three-quarters of whom are female and one-quarter of whom are male. Although females constitute more than seventy-five per cent (75%) of the workforce, only 8.7% of them work full time, while over 50% of the males occupy full-time positions. Females are assigned to menial jobs, while males are assigned to the desirable jobs. For instance, in 1977 forty-one per cent (41%) of the females were employed in the two lowest job classifications in the store, the female customer assistants and wrap desk clerk jobs, and eighty-seven per cent (87%) of these females were scheduled to work 20 hours or less per week. All upper level management jobs are male jobs. The gross earnings for males far outdistance the gross earnings for females. All the jobs within the store are unskilled jobs, requiring no formal education or prior experience. All employees learn on the job.

Plaintiff, Doris Affeldt, was hired as a restaurant cashier-hostess in August 1975. In 1976 she repeatedly attempted to transfer into other more promising departments but was automatically and firmly rejected each time. Her persistency resulted in a campaign of harassment directed against her by the company resulting on September 9, 1976, in her constructive discharge. She subsequently filed a complaint alleging that J.C. Penney's refusal to transfer her and other females was the result of respondent's discriminatory policy toward females and violated

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.* She specifically charged that under the J.C. Penney system once the store assigns individuals to entry-level jobs, male or female, it refuses to permit them to transfer to other jobs and departments. Once an individual is hired and assigned to a particular job or department because of sex, a disparate treatment practice, he or she because of the company's no-transfer and no-posting policy is locked into that job or department. This practice has a disparate impact upon females because females have an incentive to transfer out of their initially assigned menial female jobs, while these practices do not have a disparate impact upon males because males have no desire to transfer out of their initially assigned desirable jobs. Few promotions are permitted, and when permitted females are promoted from a female job to other female jobs, all along menial lines. The plaintiff claims that she and all females were victims of this dual, disparate treatment and disparate impact system.

Prior to trial, Affeldt requested that the trial court certify a class, with her as its sole representative, consisting of all females who were injured by the system, consisting of both disparate treatment and disparate impact employment practices. She supported her motion for class certification with statistical evidence which showed beyond all doubt that not only she but that all females were the victims of the company's discriminatory treatment and discriminatory impact lock-in system. This evidence showed that plaintiff and members of her class suffered identically from that discriminatory policy. The respondent never disputed the accuracy of the statistical evidence but simply ignored it.

The district court denied class certification because plaintiff did not prove her case on the merits and because

it was said that plaintiff's statistical evidence was irrelevant as to the class action allegations. Although admitting the plaintiff produced evidence of discrimination . . . "plaintiff's complaint suggests possible discrimination in transfer and promotion" . . . "there is a slight chance that she was discharged for seeking a promotion and was denied because she was a woman" . . . "the statistics showing females in low paying jobs might be indicative of possible discrimination through statistics", [Memorandum Opinion of the District Court of March 16, 1979, pages 2-3 (appendix A21-A22)] the Court proceeded to rely upon the defendant's affidavits going to the merits to conclude that plaintiff's troubles stemmed from other sources—her personality conflict with other people. The Court reached this conclusion without any evidentiary hearing and without giving her any opportunity to rebut such allegations. The Court rejected plaintiff's argument that it had no authority "to conduct a preliminary inquiry into the merits in order to determine whether it may be maintained as a class action". *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974). It refused to consider plaintiff's statistical evidence showing beyond all doubt the company's discriminatory policy—that females were not permitted to transfer out of their entry level jobs.

The plaintiff continued to argue that even though class certification was denied, the same order of proof in establishing a prima facie case remained intact when an individual alleged that she was a victim of a pattern and practice of discrimination. In these cases injunctive relief is identical and the only difference is in monetary relief. In an individual, non-class action, where the plaintiff alleges that she was a victim of a discriminatory policy and not simply of an individual discrimination decision, and if she succeeds in establishing a prima facie case

she is entitled, like a class action representative who establishes a prima facie case, to the rebuttable presumption that the respondent is a "proven wrongdoer" and that "individual . . . decisions were made in pursuit of the discriminatory policy". *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 359 (1977), hereinafter *"Teamsters"*. The District Court refused to apply this order of proof to the plaintiff in this case and as such the plaintiff did not receive the benefit of these presumptions.

The District Court rejected the plaintiff's argument that by refusing to consider plaintiff's statistical evidence which showed that plaintiff was a victim of a discriminatory selection process—that she was automatically rejected for transfer/promotion because of her sex, it denied the plaintiff the order of proof and presumption as laid down by this Court in *Teamsters*. The District Court also rejected plaintiff's contention that the defendant, and not the plaintiff, has the duty to persuade in disparate impact cases, that is, that its no-posting and no-transfer rules were justified by business necessity reasons.

On appeal the Sixth Circuit affirmed the trial court's decision that the *Green-Burdine* state of mind test (*McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)) was a defense to an individual pattern and practice case and that the court was correct in denying class certification.

REASONS FOR GRANTING THE WRIT

There are five special and important reasons why the writ should be granted:

(1) This case presents the problems which are of crucial importance to the survival of Title VII, the correct order of proof in disparate treatment and disparate impact pattern and practice cases and whether the *Green-Burdine* state of mind test with its duty to produce can be used as a defense to pattern and practice cases.

The right to be free from employment discrimination enjoys a preferred position in the hierarchy of rights protected by this Court. This was not always so, however, for in the pre-1964 era, discrimination in employment was regarded as only a private wrong, a private affair between the plaintiff and the discriminating institution. The courts refuse to see any social connection between the alleged discriminatory act and adverse effects upon other minority groups' interests in society. It was literally impossible for the plaintiff to prove discrimination for he had to prove state of mind—that the employer or labor union had a hostile or evil motive when it discriminated against him. Such a private law definition of discrimination resting upon fault, culpability, or specific intent of the respondent made it almost impossible for the plaintiff to prove discrimination. See R.J. Affeldt, *Title VII in the Federal Courts—Private or Public Law (Part I)*, 14 VILLANOVA L. REV. 664 (1969), and R.J. Affeldt, *Title VII in the Federal Courts—Private or Public Law (Part II)*, 15 VILLANOVA L. REV. 1 (1969). In the post-1964 period after Title VII became effective, the courts developed three types of prima facie cases, based upon the theories of disparate treatment and disparate impact. In individual, non-class action or non-pattern and practice cases where

plaintiff alleges that a single individual discriminated against him, the courts required that plaintiff established a prima facie case by showing that he applied for a vacant job, was qualified, and was rejected in favor of a white. The defendant only had the duty to produce any non-discriminatory legitimate reason in order to rebut the prima facie case. It thus became the duty of the plaintiff to prove pretext or intent in the third phase. This test proves workable for simple individual cases for it focused the court's attention upon the factual issue of the reasons for defendant's acts. *McDonnell-Douglas v. Green,* 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

This Court, however, developed a different order of proof for pattern and practice or policy cases where a class representative or single individual claimed that he or she was a victim of a discriminatory institutional practice or system involving a disparate treatment or disparate impact practice. It held that these types of cases involved more than isolated incidents but were concerned with the regular, routine, and repetitive policy which affected the public interest and as such were public wrongs. See R.J. Affeldt, *supra,* 14 & 15 VILLANOVA LAW REVIEWS (1969). Statistics alone or statistics in conjunction with complementary evidence, it was held, could establish a prima facie case. When once a prima facie case is established it was incumbent upon the defendant to rebut it by showing that the statistics were either inaccurate or insignificant. The defendant in effect had the duty to rebut the presumption that the plaintiff was a proven wrongdoer and that each individual decision was made in pursuit of the discriminatory policy and that could only be done by showing that plaintiffs were not the victims of such a policy. *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976). The defense of good faith or allegations that the defendant hired

the most qualified did not constitute a defense. *Teamsters v. U.S.*, 431 U.S. 324 (1977). If the defendant failed to meet the plaintiff's case with countervailing statistics the rebuttable presumption became an irrebuttable one. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that plaintiff could establish a prima facie case of disparate impact in the same manner but held that the defendant had the duty to persuade by justifying the use of a neutral practice with a business necessity reason.

This was the status of the law until recently. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court reaffirmed and clarified the sequential order of proof laid down by *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973). Lately, however, many circuits and district courts are returning to the intent era of pre-1964 before Title VII was enacted. They are justifying its return in the name of this Court's decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and are applying the *Green-Burdine* state of mind test, evil or hostile motive, to pattern and practice disparate treatment and disparate impact cases. This constitutes an attempt to amend Title VII without congressional approval and illustrates judicial activism at its worst. This trend spells out the death knell of Title VII unless it is halted.

It is true that this decision clarified the law in respect to individual visa individual cases, where the plaintiff claims that she was a victim of prejudice upon the part of the single corporate official. The state of mind test is highly appropriate here. It is not true, however, that this Court held that this one-dimensional test was applicable to three-dimensional wrongs, that to the individual, the group of which he is a member, and the public interest. See Affeldt articles, *supra*, 14 and 15 VILLANOVA LAW REVIEWS (1969). It was the prevailing opinion that this

Court's decisions in *Teamsters*, 431 U.S. 324 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); and *Hazelwood School District v. United States*, 433 U.S. 299 (1977), had clearly laid down the order of proof in pattern and practice cases.

The result of the application of this one-dimensional approach to a three-dimensional situation has been catastrophic for Title VII plaintiffs. It has irreparably interfered with the enforcement of Title VII in a four-fold manner: (1) In the practical order the plaintiff can no longer establish a prima facie case of discrimination with statistics alone (*Teamsters*) but because of the light burden to produce cast upon the defendant, that of producing any legitimate reason the plaintiff has the duty to eliminate all reasons and variables for the statistical disparity. The effect is that the plaintiff must establish a *per se* case of discrimination, not only a prima facie case. *Pegues v. Mississippi State Employment Svc.*, 699 F.2d 760 (5th Cir. 1983); *Hill v. K-Mart Corp.*, 699 F.2d 776 (5th Cir. 1983); *Bauer v. Bailer*, 647 F.2d 1037 (10th Cir. 1981); *Croker v. Boeing Co.*, 662 F.2d 975 (3rd Cir. 1981).

(1) The plaintiff no longer in a pattern and practice prima facie case established by a statistical disparity of three (3) or more standard deviations is entitled to the rebuttable presumption that the defendant company intentionally discriminated against her and the class and that it is a proven wrongdoer and all individual decisions were made in pursuit of the discriminatory policy. The defendant company no longer has the duty to meet plaintiff's statistics head-on by showing that they are either inaccurate or insignificant, but can easily rebut plaintiff's prima facie case in a sideway manner by conjuring up any legitimate non-discriminatory reason. In effect, in a pattern and practice case the plaintiff is not entitled to

any presumption of intent, but must prove intent by eliminating the countless reasons for the statistical disparity even though all such information is in the possession of the defendant.

(II) All individual non-class action cases are subject to the *Burdine* sequential order of proof, regardless whether they are pattern and practice or non-pattern and practice cases.

(III) The defendant's duty to persuade as laid down by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), is no longer viable and neutral employment practices with their focus upon the consequences of the practice and not its intent, no longer has to be justified by the business necessity test, but by the intent test under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In the instant case the court ignored not only plaintiff's statistics but the neutral practices of the respondent company's no-transfer and no-posting rules and the neutral practice of subjectivity in its hiring and job assignment system.

(2) There is a deep conflict within the circuits and the district courts over whether the *Green-Burdine* defense, the duty to produce any legitimate, non-discriminatory reason is an adequate defense to an individual or class action pattern and practice prima facie case. The following circuits and district courts have held that the *Green-Burdine* defense rebuts a plaintiff's policy or pattern and practice prima facie case: *Bauer v. Bailer*, 647 F.2d 1037, 1038 (10th Cir. 1981); *Ste. Marie v. Eastern Rwy. Assoc.*, 650 F.2d 395, 396 (2nd Cir. 1981); *Croker v. Boeing Co.*, 662 F.2d 975, 976 (3rd Cir. 1981); *Trout v. Lehman*, 702 F.2d 1094, 1108 (D.C. Cir. 1983) (MacKinnon, dissenting); *Pegues v. Mississippi State Employment Svc.*, 699 F.2d 760 (5th Cir. 1983), *rehrg. denied*, 705 F.2d 450 (1983); *Lewis*

v. Bloomsburg Mills, ... F. Supp. ....., 30 F.E.P. Cases 1715 at 1732 (D.C. S.C. 1982); *Agarwal v. Arthur G. McKee & Co.*, 644 F.2d 803 (9th Cir. 1981); *EEOC v. Hartford Fire Ins. Inc.*, ... F. Supp. ....., 31 F.E.P. Cases 531 (D.C. Ct. 1983).

The following circuit and district courts hold that the duty to produce burden is not an adequate defense to a disparate treatment pattern and practice prima facie case: *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1130 (8th Cir. 1981); *Vuyanich v. Republic National Bank of Dallas*, 521 F. Supp. 656 (D.C. Tx. 1981); *Thompson v. Sawyer*, 678 F.2d 257, 283-284 (D.C. Cir. 1982); *O'Brien v. Sky Chefs*, 670 F.2d 864 (9th Cir. 1982); *McKenzie v. Sawyer*, 684 F.2d 62, 71 fn.7 (D.C. Cir. 1982); *Boykin v. Georgia Pacific Co.*, 706 F.2d 1384 (5th Cir. 1983); *Mistretta v. Sandia Corp.*, (*sub nom., EEOC v. Sandia Corp.*), 639 F.2d 600, 621-623 (10th Cir. 1980); and E. Athas, *Defendant's Burden of Proof in Title VII Class Action Disparate Treatment Suits*, 31 AMERICAN UNIVERSITY LAW REVIEW 755 (1982).

The following courts contend that the *Green-Burdine* defense constitutes a complete defense to disparate impact cases: *Lewis v. Bloomsburg Mills*, ... F. Supp. ..... (D.C. S.C. 1982); *EEOC v. Kimbrough Investment Co.*, 703 F.2d 98, 100 (5th Cir. 1983), while the following courts contend that the *Green-Burdine* defense does not constitute a defense to a disparate impact case: *Johnson v. Uncle Ben's*, 657 F.2d 750, 751 fn.3 (5th Cir. 1981); *Vuyanich v. Republic National Bank of Dallas*, 521 F. Supp. 656 (D.C. Tx. 1981); and *Heffernan v. Western Electric Co.*, 510 F. Supp. 712 (N.D. Ga. 1981).

The rationale of the courts which hold that the *Green-Burdine* duty to produce defense is not a defense to pattern and practice disparate treatment cases is that this Court in *Teamsters* rejected such an argument. *Id.*, 431 U.S. 324, fn.44-45 (1977). "In a complex class action

utilizing statistical proof and counter proof, the value of the *Burdine* sequence—to highlight the issues in contest—is about as relevant as a minute is to a thermonuclear battle". *Vuyanich v. Republic National Bank*, 521 F. Supp. 656, 661-663 (D.C. Tx. 1981). "Nothing in *Burdine*, a single plaintiff case, suggests that the Court intended *Burdine* procedures to supplant the procedures for proving classwide disparity announced in *Teamsters* and *Hazelwood*." *Payne v. Travenol Laboratories*, 673 F.2d 798, 817-819 (5th Cir. 1982). The rationale of the courts which hold that the *Green-Burdine* defense rebuts a pattern and practice case rests upon the premise that *Burdine* or *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), overrules *Teamsters*. *Agarwal v. Arthur G. McKee & Co.*, 644 F.2d 803, 805-806 (9th Cir. 1981).

(3) The Court has a duty to clarify the confusion generated by its decision in *Teamsters v. United States*, 431 U.S. 324 (1977) distinguishing between the order of proof in an individual, non-class action and a class action case. It is respectfully submitted that the Court intended to distinguish between pattern and practice cases and non-pattern and practice cases.

Two circuits have held that "statistical evidence may establish a prima facie case of employment discrimination in an individual action as well as in a class action". *Davis v. Califano*, 613 F.2d 957, 962-963 (D.C. Cir. 1979); *Chrisner v. Complete Auto Transit*, 645 F.2d 1251 (6th Cir. 1981). In these cases the individual, non-class action plaintiff alleged that she was a victim of the company's discriminatory disparate treatment and disparate impact practices. These allegations are identical to the allegations of a class representative except that in an individual case, monetary damage is limited to the individual plaintiff while injunctive relief is available to all employees in both types

of cases. In accordance with this view these circuit courts applied the *Teamsters* pattern and practice order of proof to individual disparate treatment cases (*Davis v. Califano, supra*) and the *Griggs* disparate impact order of proof to individual disparate impact cases (*Chrisner v. Complete Auto Transit*, 645 F.2d 1251 (6th Cir. 1981).

Other circuits, however, as in the instant case, continued to apply the *Green-Burdine* state of mind test to all individual non-class action cases, regardless of whether they allege an individual instance of discrimination (*Green-Burdine*) or that they are victims of a discriminatory policy. In applying the *Green-Burdine* order of proof to a pattern and practice case the courts hurt the plaintiff immeasurably for they fail to indulge in the presumption that the employer is a proven wrongdoer or that each individual decision was made in pursuit of the discriminatory policy. The *Green-Burdine* order of proof does not extend this presumption to the plaintiff and as such, a finding of no pretextuality without it seriously prejudices the plaintiff. See *Ste. Marie v. Eastern Rwy. Assoc.*, 650 F.2d 395, 406-407 (2nd Cir. 1981).

This is exactly what happened in the present case for the Magistrate found no pretextuality whereas it is evident that she would have found pretextuality if she had proceeded under the correct presumptions. The courts in these types of individual cases look upon the statistics not as the cause of the discrimination but only as circumstantial evidence which has a slight bearing on pretextuality.

(4) This Court also has a duty to clarify the elements which a plaintiff must prove in order to establish a prima facie pattern and practice case. In *Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *Griggs v.*

Duke Power Co., 401 U.S. 424 (1971), it attempted to do this but it is evident that many courts believe that *Burdine* overrules these decisions. It is incumbent upon this Court to address the issue of whether a Title VII plaintiff must prove a *per se* case of discrimination by eliminating all possible causes or variables for the statistical disparity.

(5) This Court also has a duty to define what is meant by a neutral employment practice as defined in its decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Some courts have converted the disparate impact test into the *Burdine* disparate treatment test by defining a neutral practice in terms of a state of mind subjective test of specific intent while other courts have continued to define it in terms of an objective test to be defended only by a business necessity reason. *Moore v. Hughes Helicopter*, 708 F.2d 475 (9th Cir. 1983); *Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 95 (6th Cir. 1982); *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 638-639 (4th Cir. 1983); *Pope v. City of Hickory*, 679 F.2d 20 (4th Cir. 1982); *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 799-802 (5th Cir. 1982); *Mortenson v. Callaway*, 672 F.2d 822, 824 (10th Cir. 1982). See also, Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARVARD LAW REVIEW 945 (1982).

For all these reasons petitioner requests that this Court grant her petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 17, 1983)

No. 81-1581

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DORIS J. AFFELDT,
Plaintiff-Appellant,

v.

THE J. C. PENNEY COMPANY,
Defendant-Appellee.

ORDER

Before: ENGEL, *Circuit Judge*; WEICK and PHILLIPS, *Senior Circuit Judges.*

Doris J. Affeldt appeals from the district court's entry of judgment against her in a Title VII sex discrimination action against her former employer, J. C. Penney Company. Affeldt, a white female, was employed as a full-time hostess/cashier in the restaurant of J. C. Penney Company's Harper Woods, Michigan store in August 1975. After five months, she claims to have twice asked to be transferred into another department and been refused. In March 1976, she claims to have requested a transfer into the all-female cosmetics department. This request was also denied. Finally, in August 1976, Affeldt was summoned by the store personnel manager and interviewed in connection with complaints from customers and fellow waitresses.

Affeldt denied any responsibility for the problems. Shortly thereafter, Affeldt quit because she allegedly felt compelled to do so by her "locked-in status" and the futility of further transfer requests.

Affeldt filed this suit claiming sex discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000 *et seq.* Upon written stipulation of the parties, the matter was referred to U.S. Magistrate Barbara K. Hackett under Fed. R. Civ. P. 53(c). The cause was fully tried before Magistrate Hackett, who concluded that not only did Affeldt fail to demonstrate a prima facie case of employment discrimination but also that J. C. Penney clearly explained the non-discriminatory reasons for its actions. [2] Accordingly, the magistrate recommended entry of judgment against Affeldt and denial of class certification. The district court accepted the magistrate's findings and followed the recommendations.

On appeal, Affeldt primarily contends that the magistrate improperly refused to consider statistical evidence establishing her prima facie case. She specifically argues that statistical evidence alone may constitute a prima facie case of employment discrimination in an individual action, *see Chrisner v. Complete Auto Transit*, 645 F.2d 1251, 1259 n.7 (6th Cir. 1981); *Davis v. Califano*, 613 F.2d 957, 962-63 (D.C. Cir. 1979), and that the magistrate erroneously failed to analyze her claim under all the applicable employment discrimination theories. *See Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 95 (6th Cir. 1982). We need not reach this prima facie case issue, however, since the ultimate factual issue in this case has been decided in favor of J. C. Penney.

The Supreme Court very recently explained that:

> The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." *Burdine, supra*, at 253, 101

S.Ct., at 1093. In other words, is "the employer . . . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978), *quoting Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n.15, 97 S.Ct. 1843, 1854, n.15, 52 L.Ed.2d 396 (1977). The *prima facie* case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco, supra*, 438 U.S., at 577, 98 S.Ct., at 2949. Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff." *Burdine, supra*, 450 U.S., at 253, 101 S.Ct. at 1093.

[3] *United States Postal Service Board of Governors v. Aikens*, ... U.S. ....., 103 S.Ct. 1478, 1482 (1983). Thus, regardless of the plaintiff's success in establishing a prima facie case, if the defendant responds by offering proof of the reason for the plaintiff's treatment, the district court is in a position to decide the ultimate factual question of discrimination *vel non*. *Id.*

In this case, J. C. Penney offered evidence of its reasons for denying Affeldt's transfer requests and the trier of fact properly proceeded to this ultimate issue finding that:

> Aside from whether plaintiff can demonstrate a prima facie case, the defendant has amptly [sic] artic-

> ulated legitimate non-discriminatory reasons for its treatment of plaintiff. The record clearly establishes that plaintiff was not performing satisfactorily in her present position. The testimony was unequivocable [sic] and the exhibits support the testimony that the nature and frequency of the complaints received concerning plaintiff were extraordinary.

Magistrate Hackett considered and weighed the evidence and found not only that "plaintiff's testimony lack[ed] credibility" but also that plaintiff herself was responsible for the situation and circumstances of which she complained. Upon a review of the record, we are of the opinion that these findings are not clearly erroneous.

Affeldt also contends that the district court erred in its denial of class certification. We disagree. The district court repeatedly refused Affeldt's motions for class certification finding that she failed to satisfy at least two of the requirements of Fed. R. Civ. P. 23(a)—typicality of claims and common questions of law or fact. The question of class certification is addressed to the discretion of the trial court and is reviewable on an abuse of discretion standard. *Ott v. Speedwriting Publishing Company*, 518 F.2d 1143 (6th Cir. 1975). We find no abuse of discretion in the district court's denial of class certification in this case. Accordingly,

[4] IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

JUDGMENT ENTRY AND ORDER OF THE UNITED STATES DISTRICT COURT ACCEPTING THE MAGISTRATE'S REPORT

(Filed August 14, 1981)

Civil No. 77-72204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DORIS J. AFFELDT,
Plaintiff,

vs.

J. C. PENNEY,
Defendant.

JUDGMENT

The above-entitled matter having come on for hearing on the briefs on the defendant's motion for entry of judgment upon the defendant's motion for directed verdict, the Honorable James P. Churchill, United States District Judge, presiding, and in accordance with the order entered on August 14th, 1981;

IT IS ORDERED AND ADJUDGED that judgment be granted in favor of the defendant. Costs shall be taxed in accordance with Rule 54(d) of the Federal Rules of Civil Procedure.

Dated at Detroit, Michigan, this 14th day of August, 1981.

JOHN P. MAYER
Clerk of the Court
by /s/ (Illegible)
Deputy Clerk

Approved:

/s/ JAMES P. CHURCHILL
United States District Judge

Civil No. 77-72204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DORIS J. AFFELDT,
Plaintiff,

vs.

J. C. PENNEY,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT UPON DEFENDANT'S MOTION FOR DIRECTED VERDICT

At a session of said court held in the
Federal Building and U. S. Courthouse,
Detroit, Michigan, on August 14, 1981.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

On October 22, 1980, the above-entitled matter was referred to Magistrate Barbara K. Hackett pursuant to

Rule 53 of the Federal Rules of Civil Procedure. On April 17, 1981, the Magistrate's Report and Recommendation was filed with this Court.

The Court has reviewed the Magistrate's report as a master's report pursuant to Rule 53(c) of the Federal Rules of Civil Procedure. The Court has also reviewed the record and considered all of the matters filed subsequent to the filing of the Magistrate's Report.

It is the opinion and finding of this Court that the Magistrate's findings of fact are not clearly erroneous. The findings of fact set forth in the report are accepted.

The plaintiff in the above-entitled matter has failed to establish that the defendant, as the plaintiff's employer, discharged her or otherwise discriminated against her on the basis of sex with respect to her compensation, or the terms, conditions, or privileges of employment in violation of 42 U.S.C.A. § 2000e-2(a)(1) (1974). Furthermore, the plaintiff has failed to establish that **[2]** the defendant, as the plaintiff's employer, limited, segregated, or classified its employees or applicants for employment on the basis of sex in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee in contravention of 42 U.S.C.A. § 2000e-2(a)(2) (1974).

In view of the foregoing, IT IS ORDERED that the defendant's motion for entry of judgment upon the defendant's motion for directed verdict be and hereby is GRANTED.

/s/ JAMES P. CHURCHILL
United States District Judge

MAGISTRATE'S REPORT AND RECOMMENDATION IN THE UNITED STATES DISTRICT COURT

(Filed April 17, 1981)

Civil No. 7-72204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DORIS J. AFFELDT,
Plaintiff,

vs.

THE J. C. PENNEY CO.,
Harper Woods Store,
Defendant.

MAGISTRATE'S REPORT AND RECOMMENDATION

Plaintiff Doris J. Affeldt filed this suit alleging that the defendant J. C. Penney, Inc. store located in Harper Woods, Michigan refused to transfer and/or promote her within the company on account of her sex, in violation of Title 42 U.S.C. §2000(e), *et seq.* She charges deliberate and willful discrimination in employment. Plaintiff sought class certification which was denied in this case by the Hon. James P. Churchill. Relief now sought includes job reinstatement, monetary damages, punitive damages, and attorney fees.

This case was referred to and tried before Magistrate Barbara K. Hackett without a jury. The Magistrate having considered the pleadings, the testimony of the witnesses,

the documents in evidence, and the stipulations of the parties, and being fully advised in the premises, hereby makes the following Findings of Fact and Conclusions of Law, as required by Rule 52, Federal Rules of Civil Procedure.

FINDINGS OF FACT

Plaintiff Doris J. Affeldt is a white female citizen of the United States and a resident of the City of Detroit and the State of Michigan. She was employed as a cashier-hostess in the restaurant at the J. C. Penney store in Harper Woods, Michigan from August 11, 1975 until her "constructive discharge" on or about September 1, 1976.

[2] The defendant J. C. Penney store located at 18000 E. Eight Mile Road, Harper Woods, Michigan 48225, is one of a nationwide chain of department stores operated by J. C. Penney, Inc. Defendant offers for sale to the public a large variety of personal, household, and automotive goods and appliances. Defendant also maintains a restaurant on its premises in Harper Woods, Michigan. J. C. Penney, Inc. is an employer in an industry affecting commerce.

Prior to her employment, plaintiff had completed a J. C. Penney, Inc. employment application in which she specifically applied for a hostess-cashier or a sales position. She listed on her application under *previous employment* hostess-cashier, Weight Watchers' instructor-lecturer (Plaintiff's Exhibit 2). No previous sales experience was noted notwithstanding there was additional space on the application form where she could have included other information had she chosen to do so.

Plaintiff's responsibilities as a hostess-cashier included handing-out menus to customers, seating customers, overseeing of restaurant, taking money for receipts, operating

the cash register, and general hostess responsibilities. She made out the waitresses' work schedules and assigned them their work stations.

Doris J. Affeldt testified that she requested a transfer out of the restaurant in January, 1976, when she approached Bert Ryder, District Operations Personnel Manager, while he was in the restaurant, expressing her interest in "any manager training program that he had" or "any selling specialist job that he had." She testified that he told her he had nothing for her. Her deposition states that he told her he had nothing for her at that time. She further testified she approached Monroe Brickner, the store manager, in February, 1976, again in the restaurant, indicating that she would like to better herself. He advised her that he would be happy to talk with her, that he would get back to her later, but never did. Plaintiff admitted she never again contacted him. It is plaintiff's testimony that in March, 1976 she approached [3] the cosmetic department manager Sally Wilton about a rumored opening in that department. She testified that the cosmetic manager stated there was an opening which would pay less than plaintiff presently was earning. Plaintiff testified that she said it didn't matter. She was advised by Sally Wilton to see Mr. Ryder. Plaintiff admitted that she did not see Mr. Ryder again about a transfer or a promotion, that in fact she had approached him only that one time in the restaurant. The next time she saw Mr. Ryder was at a corrective interview when customer and fellow employee complaints against her were being reviewed. These complaints generally alleged rudeness to customers and staff, overloading stations, treating waitresses unfairly, and preferential treatment for male customers.

Plaintiff then testified that she was interested in the jewelry department and had asked other employees about

possible openings and was advised that there were no openings. Plaintiff admitted that she never spoke to anyone else in any other department about specific positions. It is important to note that the cosmetic department and the jewelry department, according to plaintiff's own testimony, are all-female employee departments.

George W. Neely, Personnel Manager of the store at the time of these alleged incidents, testified that if a person asks for a transfer, qualifications are reviewed by looking at the application, but that nothing is done unless a vacancy exists. At the time plaintiff sought an unspecified position in the cosmetic department, there was no vacancy. A later review of plaintiff's personnel file indicated plaintiff had no experience in selling cosmetics. He indicated that transfer requests and vacancies are filled after a search within the store and that it is the policy of the store to follow through on transfer requests and to talk to supervisors.

Mary Rucinski testified that she is the women's sportswear department manager and that department transfers are handled as follows: If a department manager is approached by an employee [4] requesting a transfer, no action is taken or further inquiry made unless an opening exists. If there is in fact an opening, the matter is reviewed with the personnel manager, the employee's present department manager, and referred to the department manager having the opening. Transfer requests as a matter of policy are honored, if at all possible. Mary Rucinski, who was present at the above corrective interview with plaintiff and Bert Ryder, advised that during the final interview a job transfer was neither requested by plaintiff nor discussed by any of the parties.

Bert Ryder, the district operations personnel manager at the time defendant store opened, also testified

transfer requests are acted upon only if there is a job vacancy in the store. He testified that plaintiff asked him for a transfer to the cosmetics department and that he referred her to the department manager. The only time he talked to Doris Affeldt was while passing her in the restaurant where she was on-the-job as a hostess and that he conferred with her in his office only during the corrective interview at which Mary Rucinski was present. He also concurred in earlier testimony that procedures to fill vacancies include looking internally when job vacancies exist and to review pending applications.

Monroe Brickner, the store manager, testified that he does not recall plaintiff ever asking him for a transfer.

Sally Wilton testified that plaintiff never requested a transfer to her department to her knowledge.

Barbara Guillmette, the original personnel specialist hired to do the store-opening staffing, indicated the criteria for hiring at the time was to select persons according to experience, availability and preference. She has significant day-to-day responsibility in the interview and selection of applicants and employees for transfer, promotion and job placement. She testified, supported by various exhibits, that there were any number of promotions and transfers of females throughout the stores at various times, particularly during plaintiff's employment, *as positions became available*. She reminded the court that plaintiff **[5]** was hired for the position for which she applied and was assigned the hours she sought. She testified that from 1975 through 1980, 99% of transfer requests came through her and that none ever was received from plaintiff. She advised that persons requesting transfers within the store always are considered for transfer, that it is store policy to do so. She further testified that customer complaints are very rare.

She explained that long and short form applications are made available to job applicants, depending on the job the person is requesting.

This Magistrate who had the opportunity to hear and observe the witnesses throughout these proceedings finds that plaintiff's testimony lacks credibility.

CONCLUSIONS OF LAW

As set forth in *Texas Department of Community Affairs v. Burdine*, decided March 4, 1981, the United States Supreme Court has reiterated that a plaintiff in a Title VII case has the burden of establishing a prima facie case of employment discrimination. As set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, the basic allocation of burdens and order of presentation of proof are that plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. Fundamentally, the court concluded that in establishing a prima facie sex discrimination case, a plaintiff must demonstrate more than that she applied for a position. A female plaintiff must demonstrate that there was a position available and the available position was subsequently filled by a less qualified male under circumstances which would suggest unlawful motivation. Plaintiff has not established discriminatory treatment based upon sex in this fact situation. Even the exhibits and statistics relied on by plaintiff reflecting transfers or promotions demonstrate that women have been transferred or promoted in greater numbers than men. She has not established she ever was denied an existing employment opportunity. This [6] record does not indicate that an individual employment decision having to do with transfer or promotion for Doris J. Affeldt was

ever made by defendant in this case. Qualified or not, plaintiff has failed to establish that she was seeking an available position, one for which she eventually was rejected, one which subsequently was filled by a male.

There is not enough evidence in this record to permit the trier of the facts to infer the critical issue. An articulation not admitted into evidence will not suffice. Thus, plaintiff cannot meet her burden through the complaint or by arguments of counsel. Although plaintiff is a member of a protected class, she has not satisfied this Magistrate that she was denied an employment opportunity because she is a female. The happenings in this case are unrelated to plaintiff's sex.

Aside from whether plaintiff can demonstrate a prima facie case, the defendant has amptly articulated legitimate non-discriminatory reasons for its treatment of plaintiff. The record clearly establishes that plaintiff was not performing satisfactorily in her present position and therefore was not eligible for a more desirable position. The testimony was unequivocable and the exhibits support the testimony that the nature and frequency of the complaints received concerning plaintiff were extraordinary. Plaintiff had accumulated more complaints about her performance than any employee any of the witnesses could recall. Most of the complaints addressed plaintiff's primary job responsibility as a hostess in the restaurant, as the complaints included alleged rudeness, preferential treatment of customers, treating waitresses unfairly. Plaintiff had been warned about her performance and subsequently determined that she could not tolerate the working situation in the restaurant and chose to leave of her own accord notwithstanding she refused to sign resignation papers. The customer complaints were submitted in writing and also are a part of this file.

As argued by defendant in renewing its motion for a directed verdict at the close of the case, there has been no demonstration [7] whatsoever with respect to damages suffered by plaintiff nor has there been any evidence submitted with respect to her income or purported income loss.

In summary, plaintiff sought and received a position of hostess-cashier and as a result of consistent difficulties in dealing with customers and co-workers she elected to leave that position. This record does not support her allegation that she applied for and was denied a transfer or promotion to another position. Even if a position was available there is absolutely no evidence to suggest that any position was filled by a man of lesser qualifications than plaintiff.

When the plaintiff in a Title VII case has proved a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the non-discriminatory reasons for its actions. *Texas Department of Community Affairs v. Burdine, supra.* Assuming that the plaintiff has established a prima facie case, which the Magistrate does not believe is true in this fact situation, the defendant has explained clearly the non-discriminatory reasons for its actions. As stated in *Texas v. Burdine*, the employer still has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. Defendant certainly has met its burden of articulating some legitimate non-discriminatory reason for the employee's rejection for promotion or transfer, if any. Plaintiff has failed to persuade the trier of the facts that she has been the victim of intentional discrimination. Nowhere in this record does plaintiff identify the position she was seeking and the individual who was selected in her place.

The defendant in this fact situation would have an impossible burden for it could not persuade the court that it had convincing objective reasons for preferring a chosen applicant above plaintiff as no position or applicant is identified.

The employment decision in this case was made by plaintiff. She chose to seek employment elsewhere as a direct result of [8] a situation and circumstances for which she herself was responsible.

RECOMMENDATION

For the above reasons, IT IS RECOMMENDED that:

1. Defendant's Motion for Directed Verdict be granted.
2. Defendant's Motion to Strike Certain Exhibits be denied as moot.
3. Plaintiff's Motion for Reconsideration of Denial of Plaintiff's Motion for Class Certification be denied.

The parties hereby are informed that objections may be filed to this Report and Recommendation within 10 days of receipt of a copy thereof as provided for in 28 U.S.C. §636(b)(1)(C) and that failure to file objections may constitute a waiver of any further right of appeal of this Report and Recommendation.

United States v. Walters, 638 F.2d 947 (No. 78-3653, 6th Cir. decided January 20, 1981) states that "a party shall file objections with the district court or else waive right to appeal".

/s/ BARBARA K. HACKETT
United States Magistrate

ORDER OF THE UNITED STATES DISTRICT COURT DENYING PLAINTIFF'S MOTION FOR CLARIFICATION AND RECONSIDERATION OF ORDER DENYING MOTION TO CERTIFY THE CLASS

(Filed April 19, 1979)

Civil No. 77-72204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DORIS J. AFFELDT,
Plaintiff,

vs.

J. C. PENNEY CO.,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR CLARIFICATION AND RECONSIDERATION OF THE COURT'S ORDER DENYING PLAINTIFF'S MOTION TO CERTIFY CLASS

At a session of said court held in the Federal Building and U. S. Courthouse, Detroit, Michigan, on April 19, 1979.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

The Plaintiff's Motion for Clarification and Reconsideration of the Court's Order Denying Plaintiff's Motion to Certify Class has been received and considered.

The order has no bearing on the merits of the plaintiff's individual Title VII claim, which remains unaltered.

IT IS ORDERED that the plaintiff's motion be and hereby is DENIED.

/s/ JAMES P. CHURCHILL
United States District Judge

ORDER AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT DENYING MOTION TO CERTIFY THE CLASS

(Filed March 16, 1979)

Civil No. 77-72204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DORIS J. AFFELDT,
Plaintiff,

vs.

J. C. PENNEY,
Defendant.

ORDER DENYING MOTION TO CERTIFY

At a session of said court held in the Federal Building and U. S. Courthouse, Detroit, Michigan, on March 16, 1979.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

For reasons set forth in a Memorandum Opinion bearing this date, IT IS ORDERED that the plaintiff's motion to certify the class be and hereby is DENIED.

IT IS SO ORDERED.

/s/ JAMES P. CHURCHILL
United States District Judge

Civil No. 77-72204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DORIS J. AFFELDT,
Plaintiff,

vs

J. C. PENNEY,
Defendant.

MEMORANDUM OPINION

On January 26, 1979, the Court took under advisement the plaintiff's motion for class certification.

This Title VII case was brought by the plaintiff, who was "constructively discharged" as a hostess in the restaurant of a defendant J. C. Penney's Harper Woods store. The complaint alleges race and sex discrimination. The plaintiff brings the instant motion to maintain a class action on the sex discrimination count. The plaintiff seeks to have the following class certified:

> "Certify as a conditional class all present females, past females and future females (job applicants) who have been, are, or will be unfairly treated because of the defendant company's discriminatory hiring, job assignment, promotional-lock-in and discharge employment practices at its Harper Woods store."

For the plaintiff to prevail on her motion, she must satisfy all of the requirements of Rule 23(a) and one of the requirements of 23(b). Schlei & Grossman, Employment Discrimination Law, Ch. 34, p. 1085.

The facts alleged by the plaintiff in her complaint establish that on August 11, 1975, she was hired by the defendant as a hostess. Several months later she told the store personnel manager that she wanted to transfer or be promoted to a better paying job. The manager said there was nothing for her. Later, the plaintiff heard there were openings in the cosmetic department. The plaintiff approached the cosmetic department manager, who later informed the plaintiff that the store personnel manager did not even respond to her request. The **[2]** plaintiff asserts this is evidence of the defendant's policy to lock-in females to menial, low paying jobs. The defendant in response notes that the cosmetic department consisted of all females at the time of the incident. (Neely affidavit, ¶ 5).

The plaintiff asserts that after being denied the transfer, the defendant commenced a "severe campaign of harassment" against her, resulting in her "constructive discharge on the basis of sex" on September 1, 1976. Harassment came from fellow employees who threatened to have her discharged for seating blacks in wrong areas in the restaurant. The supervisors watched her more carefully than others, and the personnel office threatened to discharge her if she didn't "shape up."

The plaintiff states in her complaint:

> "Because plaintiff chose to defend the rights of blacks to enjoy equal treatment, the plaintiff, herself, became a target of discrimination which ultimately resulted in her constructive discharge."

It is noteworthy that the allegation does not mention sex as a reason.

The plaintiff continues her complaint by making broad conclusions that blacks, females, and whites who defend

blacks are discriminated against in job opportunity by the defendant. Nowhere does she assert and pinpoint an instance where the defendant's alleged harassment leading to her constructive discharge was because she was a female. She merely asserts she was denied a transfer into an all-female department, hardly suggesting that it was because of her sex. The plaintiff even concedes the harassment leading to termination was because of her defense of blacks (Complaint, ¶ 17).

In her reply brief at 14, the plaintiff asserts she has alleged an across-the-board policy of discrimination by the defendant in the recruitment, hiring, transfer, promotional, layoff, recall, disciplinary, and discharge processes. At most, the plaintiff's complaint only suggests possible discrimination in transfer and promotion. No other allegations are set forth.

In her brief in support of her motion, the plaintiff sets forth facts which suggest that most of the females at the Harper Woods Penney's are in the lower paying jobs. She does not set forth the [3] relevant work force and number of applicants and qualifications for the better paying jobs, however. (Pp. 8-11 of plaintiff's brief). Of course, we are not concerned with the merits on this motion. Apparently, there are about 400 females in the store (plaintiff's reply brief, 14).

While the figures set forth on females and their low paying jobs in relation to men might be indicative of possible discrimination through statistics, the plaintiff's complaint does not read as though her own constructive discharge was because of her espousal of women's rights in the defendant store.

It is clear that the plaintiff believes she was constructively discharged because of her support of blacks (¶

16 of complaint). There is a slight chance that she was discharged for seeking a promotion and was denied because she was a woman, but that is stretching it. The typicality requirement on the sex aspect of the case is lacking.

The plaintiff's credibility and claim are suspect after reading the affidavits and letters attached to the defendant's brief in opposition.

Bert Ryder, the defendant's personnel manager, asserts by affidavit that the plaintiff had problems getting along with fellow employees, and a number of verbal and written complaints were made about the plaintiff's conduct and attitude toward customers. Several waitresses complained about her attitude toward them, and she favored male customers and treated women customers with particular disrespect. This assertion is very interesting, since the plaintiff seeks to represent females. In ¶ 8 of the Ryder affidavit, Ryder said that when the plaintiff resigned, she never indicated it was because of sex or race. Ryder does discuss possible race problems, but nothing about sex.

Three letters are attached from customers complaining about the rude way they were treated by the plaintiff.

The plaintiff sent a letter to the defendant on September 9, 1976, saying she considered herself constructively discharged for defending females and blacks. This is attached to the defendant's brief. Ryder indicates it is the first time he heard about it, after [4] numerous meetings with the plaintiff.

The plaintiff has failed to satisfy at least two elements of Rule 23(a), both of which are required for the plaintiff to maintain a class, i.e., 23(a)(2) and 23(a)(3).

The plaintiff's major problem appears to be her personality clash with management, fellow employees, and

customers, and also her defense of blacks. The issue of sex discrimination is incidental, and Rule 23(a)(2), common questions, cannot be satisfied when individual issues predominate. *O'Connell v. Teachers College*, 63 F.R.D. 638 (S.D. N.Y. 1974). Furthermore, the plaintiff has not demonstrated that members of the class have suffered similar grievances; thus, she has failed to satisfy Rule 23(a)(3). *White v. Gates Rubber Co.*, 53 F.R.D. 412, 415 (D. Colo. 1971). *See Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir. 1975). *See also Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), *cert. denied*, 429 U.S. 960 (1976).

For the foregoing reasons, the plaintiff's motion for class certification will be denied.

/s/ JAMES P. CHURCHILL
United States District Judge